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S. Robert Chuey 39,140
Name of Attorney Registration No.

Signature of Attorney

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.: 09/905,540
Appellant(s) : Michael Dean McCutchan
Filed : July 13, 2001
Title : A KIT CONTAINING A SNACK FOOD AND DIP-CONDIMENT
TC/A.U. : 1761
Examiner : D. E. Becker
Conf. No. : 3927
Docket No. : 8169M
Customer No. : 27752

APPELLANT'S SUPPLEMENTAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

On March 31, 2004 Appellant appealed to the Board of Appeals the decision of the Examiner dated January 14, 2004, finally rejecting Claims 1, 3, 5, 6, and 17-20 of the present application. On June 25, 2004, a Brief was filed in support of that Appeal. On January 7, 2005, the Examiner mailed a withdrawal of the finality of all of the rejections. Submitted herewith is a request under 37 CFR § 1.193(b)(2)(ii) to reinstate the present Appeal. A request for a two month extension of time to respond to this Office Action is submitted herewith. This Supplemental Brief is submitted in support of that request.

NEW ISSUES

In withdrawing the finality of the prior Office Action, the Examiner appears to raise no new issues. In the new Office Action mailed January 7, 2005, the Examiner adds a different primary reference and removes one secondary reference, but makes essentially identical arguments to those made in the previous Final Office Action. It is, therefore, respectfully requested that the present Appeal be reinstated.



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S. Robert Chuey 39,140
Name of Attorney Registration No.

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1761

P&G Case 8169M

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REQUEST TO REINSTATE APPEAL UNDER 37 CFR § 1.193(b)(2)(ii)

Box AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450


Dear Sir:

The Applicants hereby request that the Appeal of this case be reinstated. On January 7, 2005, The Examiner mailed an Official Action withdrawing the finality of the rejections on Appeal. A Supplemental Appeal Brief is submitted herewith.

A request for a two month extension of time to respond to the Office Action is submitted herewith. The Commissioner is hereby authorized to charge any necessary fee under 37 CFR §1.17, and any other necessary fees to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company, Patent Division. An additional copy of this Notice is enclosed for that purpose.

Respectfully submitted,

By


S. Robert Chuey
Attorney for Applicants
Registration No. 39,140
(513) 634-0102

Date: June 7, 2005



REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio. The Inventor who is Michael Dean McCutchan assigned his interest to The Procter & Gamble Company which was recorded on October 4, 2001, reel 012230, frame 0862.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellant, or known to Appellant's legal representative that will directly affect, be directly affected by, or that will have a bearing on the Board's decision in the present appeal.

STATUS OF CLAIMS

Claims 1, 3, 5, 6 and 17-20 are pending. Claims 2, 4, and 7-16 have been cancelled.

Claims 1, 3, 5, 6 and 17-20 stand rejected and are appealed. A copy of these claims, which are being appealed, appear in Appendix I herein.

STATUS OF AMENDMENTS

No amendments have been submitted after the final office action dated January 14, 2004.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention relates to a kit for containing both a plurality of snack pieces and a dip-condiment in a space efficient package system. The kit includes a canister, a plurality of snack pieces contained within the container, wherein at least one of the snack pieces have a projected area greater than about 1900 mm², a tub attached to the container, and a dip condiment held within said tub. This kit has a space efficiency greater than about 0.15 g/cm³. (Appellant's claim 1).

The present invention also relates to a kit that includes a container, which contains the plurality of snack pieces in a nested arrangement and a tub connected to the container, which contain the dip-condiment. (Appellant's specification, page 4, lines 12-14).

In a further embodiment of the present invention, the kit comprises a container, a plurality of snack pieces contained within the container and a tub connected to the container. At least one of the snack pieces contained within the container has an edge-to-edge linear dimension greater than at least

about 20 mm. Also, the kit has a space efficiency that is greater than about 0.15 g/cm^3 . (Appellant's specification, page 4, lines 16-20).

In still a further embodiment of the present invention, the kit comprises a canister having a bottom wall and at least one side wall attached to the bottom wall, and an opening defined by the side wall and disposed at an end opposite the bottom wall. The kit also includes a plurality of snack pieces contained within the canister, a tub attached to the container and a dip-condiment held within the tub. This kit has a has a space efficiency greater than about 0.15 g/cm^3 and a chip to dip-condiment net weight ratio less than 2. (Appellant's specification, page 4, lines 21-28).

GROUNDNS FOR REJECTIONN TO BE REVIEWED ON APPEAL

- I. Claims 1, 3, 5, 6 and 17-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pringles [Potato Chip Container] in view of Snack-a-Dip [sample] and the art cited in Table 1 of Appellant's specification.
- II. Claim 20 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Pringles [Potato Chip Container] in view of Snack-a-Dip [sample] in further view of Bezek, et al. (U.S. Patent No. 6,472,007).
- III. Claims 1, 3, 5, 6 and 17-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Bezek, et al., Doritos Dippas Chips & Salsa [cited in Table 1 of Appellant's specification].
- IV. Claims 1, 3, 5, 6 and 17-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zimmerman, et al. (U.S. 2002/0122852 A1) in view of Snack-a-Dip [sample] and the art cited in Table 1 of Appellant's specification.

ARGUMENTS

- I. **Claims 1, 3, 5, 6 and 17-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Pringles [Potato Chip Container] in view of Snack-a-Dip [sample] and the art cited in Table 1 of Appellant's specification.**

The Examiner states that Pringles teaches a canister containing a plurality of snack pieces have a surface area of 2827 mm^2 , and a space efficiency of about 0.163 g/cm^3 , the canister having a sidewall, bottom wall, and top opening; and a removable lid. The Examiner further states that Snack-a-Dip has an attached tub containing a dip condiment, and a snack piece to dip ratio of 1.5. The Office Actions further states that it would have been obvious to one of skill in the art to incorporate

tub and dip Snack-a-Dip into the kit of Pringles since both are directed to chip containers and Pringles chips are commonly eaten with dip. The rejection relies very little on the Appellant's cited prior art in Table 1 of the present specification, and these other references are largely inferior to, and cumulative of the primary references.

To establish a *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the prior art.¹ Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.² The Examiner fails to establish the requisite motivation to modify or combine references.

Specifically, there is no teaching or suggestion in the references relied upon in this rejection for their combination or for the required modification. First, the Office Action asserts that it would be obvious to modify the Pringles container to include a dip container because Pringles are chips and chips are eaten with dip. Second, the Office Action asserts that the combination of Pringles and Snack-a-Dip is obvious because they are both chip containers. The Examiner appears to rely on his own experience to provide the necessary motivation to modify and combine the references. Taking the equivalent of "Judicial Notice" does not meet the requirement that the motivation to modify and combine be in the references themselves, or the knowledge generally available to one of ordinary skill in the art. The Examiner has failed to meet this burden and as such, the rejection must be overturned.

Moreover, the surface area and space efficiency requirements of the present claims which the Examiner states exists in the prior art reference (Pringles) is not taught or suggested by the prior art. More specifically, the Examiner has engaged in impermissible hindsight reconstruction.³ That is, it would not be obvious to a skilled artisan to select the Pringles kit comprising a container and chips for combination with Snack-a-Dip over the myriad of other chip choices, until one reads the present specification and finds out the importance of the chip's surface area and the space efficiency of the kit. It may arguably be true that after reading the present application those skilled in the art might measure various chip and containers products to see which have the optimal surface area and the space efficiency. But to establish a *prima facie* case of obviousness, the Examiner must point to a teaching in the prior art of these parameters and the claimed values therefore. The Examiner simply took the present specification and started measuring chips and kit until one was found that resembled

¹ *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

² *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

³ *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971)

the claimed parameters. This does not meet the Examiner's burden and is simply impermissible hindsight reconstruction. For this reason the present rejection must be overturned.

Thus, Appellant does not believe that the Examiner has properly established a *prima facie* case of obviousness against Appellant's claims. Appellant again contends that the Examiner's rejection fails to establish the requisite motivation to modify the reference, combine the references and that the Examiner engaged in impermissible hindsight reconstruction when making the present rejection. Appellant therefore requests reconsideration and allowance of Claims 1, 3, 5, 6 and 17-19 over the Examiner's 35 U.S.C. § 103(a) rejection.

II. Claim 20 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Pringles [Potato Chip Container] in view of Snack-a-Dip [sample] in further view of Bezek, et al. (U.S. Patent No. 6,472,007).

The Examiner adds Bezek '007 to the previously discussed references because Bezek '007 teaches a container that may be created in a triangular form and that may house nested triangular tortilla chips. The Appellant does not dispute that Bezek '007 teaches nested triangular chips. But for the reasons discussed above, the main references -Pringles and Snack-a-Dip- do not teach or suggest the limitations of claim 17 from which claim 20 ultimately depends. As such, this rejection fails for the same reasons discussed above.

Appellant therefore contends that the Pringles/Snack-a-Dip/Bezdek combination does not teach Appellant's invention and respectfully requests reconsideration and allowance of Claim 20 over the Examiner's 35 U.S.C. § 103(a) rejection.

III. Claims 1, 3, 5, 6 and 17-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Bezek, et al., Doritos Dippas Chips & Salsa [cited in Table 1 of Appellant's specification].

The Examiner states that Snack-a-Dip teaches a kit comprising a canister containing a plurality of snack pieces, an attached tub containing a dip condiment, the kit having a space efficiency of about 0.13426 g/cm³, the canister having a sidewall, bottom wall, and top opening; a snack piece to dip ration of 1.5; and a removable lid. The Examiner further states that Snack-a-Dip does not disclose a space efficiency greater than 0.15 or 0.20 and an area of 1,900 to 10,000 mm². The Examiner relies on Doritos for teaching a chip that has a surface area of 3700 mm². The Examiner states it would be

obvious to modify this combination to achieve the claimed packing efficiency based on Bezek's nested triangular chips.

To establish a *prima facie* case of obviousness, all the claim limitations must be taught or suggested by the prior art.⁴ Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.⁵ The Examiner fails to establish the requisite motivation to modify or combine references.

Specifically, there is no teaching or suggestion in the references relied upon in this rejection for their combination or for the required modification. First, the Office Action asserts that it would be obvious to modify the Snack-a-Dip container to achieve the claimed packing efficiency. Second, the Office Action asserts that the combination of Snack-a-Dip, Doritos and Bezek is obvious. But there is nothing in the references themselves that suggest such a combination along with the necessary modification to arrive at the present invention. The Examiner has failed to meet this burden and as such, the rejection must be overturned.

Moreover, the surface area and space efficiency requirements of the present claims which the Examiner states would be obvious in light of the prior art references, is not taught or suggested by the prior art. More specifically, the Examiner has engaged in impermissible hindsight reconstruction.⁶ That is, it would not be obvious to a skilled artisan to first select the Snack-a-Dip product and second to modify it to have greater packing efficiency and the larger surface area taught by Doritos, until one reads the present specification and finds out the importance of the chip's surface area and the space efficiency of the kit. It may arguably be true that after reading the present application those skilled in the art might measure various chip and containers products to see which have the optimal surface area and the space efficiency. But to establish a *prima facie* case of obviousness, the Examiner must point to a teaching in the prior art of these parameters and the claimed values therefore. The Examiner simply took the present specification and started measuring chips and kit until one was found that resembled the claimed parameters. This does not meet the Examiner's burden and is simply impermissible hindsight reconstruction. For this reason the present rejection must be overturned.

Thus, Appellant does not believe that the Examiner has properly established a *prima facie* case of obviousness against Appellant's claims. Appellant again contends that the Examiner's

⁴ *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

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⁶ *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971)

rejection fails to establish the requisite motivation to modify the reference, combine the references and that the Examiner engaged in impermissible hindsight reconstruction when making the present rejection. Appellant therefore requests reconsideration and allowance of Claims 1, 3, 5, 6 and 17-20 over the Examiner's 35 U.S.C. § 103(a) rejection.

IV. Claims 1, 3, 5, 6 and 17-20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Zimmerman, et al. (U.S. 2002/0122852 A1) in view of Snack-a-Dip [sample] and the art cited in Table 1 of Appellant's specification.

The Examiner states that Zimmerman teaches a canister containing a plurality of snack pieces have a surface area of 6000 mm², and a space efficiency of about 0.1 to 0.35 g/cm³, the canister having a sidewall, bottom wall, and top opening; and a removable lid. The Examiner further states that Snack-a-Dip has an attached tub containing a dip condiment, and a snack piece to dip ratio of 1.5. The Office Actions further states that it would have been obvious to one of skill in the art to incorporate tub and dip Snack-a-Dip into the kit of Zimmerman since both are directed to chip containers and Zimmerman chips are commonly eaten with dip. The rejection relies very little on the Appellant's cited prior art in Table 1 of the present specification, and these other references are largely inferior to, and cumulative of the primary references.

To establish a prima facie case of obviousness, all the claim limitations must be taught or suggested by the prior art.⁷ Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.⁸ The Examiner fails to establish the requisite motivation to modify or combine references.

Specifically, there is no teaching or suggestion in the references relied upon in this rejection for their combination or for the required modification. First, the Office Action asserts that it would be obvious to modify the Zimmerman container to include a dip container because Zimmerman are chips and chips are eaten with dip. Second, the Office Action asserts that the combination of Zimmerman and Snack-a-Dip is obvious because they are both chip containers. The Examiner appears to rely on his own experience to provide the necessary motivation to modify and combine the references. Taking the equivalent of "Judicial Notice" does not meet the requirement that the motivation to modify and

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combine be in the references themselves, or the knowledge generally available to one of ordinary skill in the art. The Examiner has failed to meet this burden and as such, the rejection must be overturned.

Moreover, the surface area and space efficiency requirements of the present claims which the Examiner states exists in the prior art reference (Zimmerman) is not taught or suggested by the prior art. More specifically, the Examiner has engaged in impermissible hindsight reconstruction.⁹ That is, it would not be obvious to a skilled artisan to select the Zimmerman kit comprising a container and chips for combination with Snack-a-Dip over the myriad of other chip choices, until one reads the present specification and finds out the importance of the chip's surface area and the space efficiency of the kit. It may arguably be true that after reading the present application those skilled in the art might measure various chip and containers products to see which have the optimal surface area and the space efficiency. But to establish a *prima facie* case of obviousness, the Examiner must point to a teaching in the prior art of these parameters and the claimed values therefore. The Examiner simply took the present specification and started measuring chips and kit until one was found that resembled the claimed parameters. This does not meet the Examiner's burden and is simply impermissible hindsight reconstruction. For this reason the present rejection must be overturned.

Thus, Appellant does not believe that the Examiner has properly established a *prima facie* case of obviousness against Appellant's claims. Appellant again contends that the Examiner's rejection fails to establish the requisite motivation to modify the reference, combine the references and that the Examiner engaged in impermissible hindsight reconstruction when making the present rejection. Appellant therefore requests reconsideration and allowance of Claims 1, 3, 5, 6 and 17-20 over the Examiner's 35 U.S.C. § 103(a) rejection.

⁹ In re McLaughlin, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971)

SUMMARY

For the reasons set forth above, Appellant submits that the Examiner has not set forth the proper evidence for the 35 U.S.C. § 103(a) rejections. Accordingly, reversal of the Examiner's findings of unpatentability is respectfully requested.

FOR: MICHAEL DEAN MCCUTCHAN

By 

S. Robert Chuey
Attorney for Appellant
Registration No. 39,140
(513) 634-0102

Dated: June 7, 2005
Customer No. 27752



APPENDIX I

Appealed Claims: Application No. 09/905,540

1. A kit for containing both a plurality of snack pieces and a dip-condiment, said kit comprising:
a canister;

a plurality of snack pieces contained within said canister, wherein the snack pieces have an average projected area ranging from about 1900 mm² to about 10,000 mm²;

a tub attached to said canister; and

a dip condiment held within said tub;

wherein said kit has a space efficiency greater than about 0.15 g/cm³.
3. A kit according to claim 1, wherein said kit further comprising a snack piece to dip net weight ratio less than about 2.
5. A kit according to claim 1, wherein said plurality of snack pieces are in a nested arrangement.
6. A kit according to claim 4, wherein said container has a bottom wall, at least one side wall attached to said bottom wall, an opening defined by said at least one side wall and disposed at an end opposite said bottom wall.
17. A kit for containing both a plurality of snack pieces and a dip-condiment, said kit comprising:

a canister having a bottom wall and at least one side wall attached to said bottom wall, an opening defined by said at least one side wall and disposed at an end opposite said bottom wall;

a plurality of snack pieces contained within said canister, the snack pieces having an average projected area ranging from about 1900 mm² to about 10,000 mm²;

a tub attached to said canister; and

a dip condiment held within said tub;

wherein said kit has a space efficiency greater than about 0.15 g/cm³ and a snack piece to dip-condiment net weight ratio less than 2.
18. A kit according to claim 17, wherein said kit has a space efficiency greater than about 0.2 g/cm³.
19. A kit according to claim 17, further comprising a removable lid attached to said side wall of said canister and covering said opening.
20. A kit according to claim 19, wherein said kit has a substantially triangular shape.

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EVIDENCE APPENDIX

Application No. 09/905,540
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RELATED PROCEEDINGS APPENDIX